DATE: September 17, 1999

CASE NO: 1998-INA-237

In the Matter of

MS. LENDY MULLER
Employer

on behalf of

MARY GOLDYN
Alien

Appearances: Tibby Blum, Esq., Attorney for Employer and Alien

Certifying Officer: Dolores Dehaan, Region II

Before: Huddleston, Jarvis and Neusner
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from Ms. Lendy Muller's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On December 7, 1995, the Employer filed a Form ETA 750 Application for Alien Employment Certification with the State of New York Department of Labor, Alien Labor Certification Office ("NYDOL") on behalf of the Alien, Mary Ziemianska Goldyn. (AF 33-34). The job opportunity was listed as "Cook, Live-in". (AF 15). The job duties were described as follows:

> Will plan menus and will cook meat, sauces, vegetables and other foods for all household meats, as well as special dinners and dinner parties; will estimate food consumption and will requisition and purchase foodstuffs; will receive and check foodstuffs and supplies for quality and quantity; will select and develop recipes.

(Id.). The stated job requirements for the position, as set forth on the application, are 2 years experience in the job offered or 2 years experience in the related occupation of Cook/Domestic. Other special requirements are: "Must be willing to live-in. No smoking on premises." (Id.)

The CO issued a Notice of Findings ("NOF") on December 18, 1997, proposing to deny certification for several reasons. (AF 37-41). First, the CO found that the documentation previously submitted does not adequately establish that permanent full-time work or need exists for a Cook, citing 20 C.F.R. 656.3. (AF 40). Second, citing 20 C.F.R. 656.21(a), the CO found that because the position offered is for a live-in Cook, the Employer must provide documentation of the alien's past paid experience supplied by the alien's previous employer(s). Third, citing 20 C.F.R. 656.21(b)(2)(i), the CO found that the requirement that the applicant live on the premises is not normally required for the occupation as defined in the Dictionary of Occupational Titles. The CO found the requirement was unduly restrictive unless supported by business necessity. In addition, the CO requested the Employer to clarify the differences between the job offered and the related occupation of Cook, Domestic and explained that pursuant to 20 C.F.R. 656.21(g), the Employer is required to comply with the placement of a job order and ad over the name of the local Job Service Office. (AF 38).

The Employer submitted her rebuttal on February 23, 1998. (AF 42-58). The Employer described the cook's daily schedule and asserted that due to the Employer's frequent and often unexpected entertaining, it is essential to employ a full-time cook. (AF 55). With regard to the live-in requirement, the Employer asserted that a live-out cook "working the standard 9:00 a.m. to 5:00

p.m. schedule would be unable to satisfy our business needs" due to the extensive evening entertaining schedule and the "countless unscheduled events when the cook was needed to prepare meals for clients who I brought to dinner unannounced." (AF 53-54). The Employer explained that in the past, catering services were used, however, there were many problems with these services and it is essential to hire a live-in cook to oversee all the duties. Finally, the Employer argues that the alien was unable to provide a letter from her previous employer, because the employer refused to speak with her. (AF 53). The Employer submitted a sworn affidavit from the neighbor of the employer. The Employer also explained the distinction between "Cook/Domestic" and "Cook/Live-In." (Id.).

The CO issued a Final Determination on March 16, 1998, denying certification. (AF 59-61). The CO found that the Employer failed to adequately demonstrate through documentation that the job offer was full time. The CO also found that the Employer failed to adequately document business necessity for the live-in requirement. In addition, the CO found the documentation submitted by a third party was unacceptable to document the alien's past, paid experience. (AF 59).

The Employer filed a Motion to Reconsider the Denial of Application for Alien Employment Certification, or in the alternative, Appeal of Denial to Chief Administrative Law Judge, on April 23, 1998. (AF 62-149). The file was subsequently forwarded to the Board of Alien Labor Certification Appeals ("BALCA").

Discussion

If a timely motion for reconsideration of the CO's FD is made, the CO must decide whether that motion will be granted or denied. Failure by the CO to rule on such a motion will result in a remand by the Board. *Charles Serouya & Son, Inc.*, 88-INA-261 (Mar. 14, 1989) (*en banc*); *Harry Tancredi*, 88-INA-441 (Dec. 1, 1988) (*en banc*); *Ruppert Landscaping Co.*, 88-INA-40 (Mar. 11, 1999); *American Telephone & Telegraph Co.*, 90-INA-567 (Jan. 9, 1991) (*order of remand*).

In *Richard Clarke Associates*, the Board sitting *en banc* held that "the certifying officer is required to state clearly whether he has denied an employer's request for reconsideration... or has granted the request and upon reconsideration, affirmed his denial of certification." *Richard Clarke Associates*, 90-INA-80 (May 13, 1992) (*en banc*). A brief explanation, not a detailed refutation, is the only requirement. *Id.*

In this matter, the record lacks any indication that the CO reviewed or considered the Employer's Motion to Reconsider Denial of Application for Alien Employment Certification. It appears that the CO merely forwarded the file and Employer's said motion to the Board without due consideration.

Order

Accordingly, this matter is hereby REMANDED for appropriate consideration and review by the CO of the Employer's request for reconsideration.

For the Panel:

_____

DONALD B. JARVIS
Administrative Law Judge

San Francisco, California